



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 10, 2003

Mr. William R. Crow
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2003-7208

Dear Mr. Crow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188333.

The San Antonio Water System ("SAWS") received a request for information relating to e-mails sent to or by the requestor using his office computer during the requestor's employment with SAWS. The requestor also asks for "[a] copy of my entire personnel folder." You have not submitted any information responsive to the request for the personnel folder, nor have you raised any exceptions to its disclosure. Therefore, we assume that, to the extent this information exists, it has been released to the requestor. If not, you must release it immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). With respect to the request for e-mail communications, you advise that you contacted the requestor seeking clarification of the scope the request. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 (1999) (concluding Public Information Act permits tolling of ten business day deadline imposed by section 552.301 during interval in which requestor and governmental body are communicating in good faith to narrow or clarify request). You have submitted a copy of the requestor's response, and you state that SAWS has identified some responsive information

that SAWS will make available for the requestor's review.¹ You claim, however, that the submitted information is excepted from disclosure under sections 552.107, 552.108, 552.111, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

You claim that a portion of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107 protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

¹You also indicate that some information within the scope of the request for e-mail communications has been automatically deleted from SAWS computers, and therefore no longer exists. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Whether a communication meets the definition of a confidential communication depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You indicate that a portion of the submitted information consists of confidential communications between SAWS staff and SAWS attorneys made for the purpose of facilitating the rendition of professional legal services. You also indicate that the confidentiality of these communications has been maintained. Based on your representations and our review, we agree that this portion of the submitted information is protected under the attorney-client privilege. Accordingly, we determine that SAWS may withhold the information you have marked pursuant to section 552.107 of the Government Code.

Next, you contend that a portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 excepts from disclosure certain records of law enforcement agencies and prosecutors. Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. Open Records Decision No. 199 (1978). An agency that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. *See, e.g.*, Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 272 (1981). If an administrative agency's investigation reveals possible criminal conduct that the administrative agency intends to report or has already reported to the appropriate law enforcement agency, section 552.108 will apply to information gathered by the administrative agency if its release would interfere with law enforcement. *See* Gov't Code 552.108(a)(1), (b)(1); Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 272 (1981). You state that the information you seek to withhold under section 552.108 "reveals [the] results of internal SAWS investigations regarding incidents which may have involved criminal conduct 'in relation to an investigation that did not result in conviction or deferred adjudication.'" You have not explained to this office how SAWS is a law enforcement agency, nor do you inform us that the records at issue have been forwarded to an appropriate law enforcement agency. Therefore, we have no basis for ruling that any of the submitted information may be withheld under section 552.108. We note, however, that you also raise section 552.111 for this information. Accordingly, we next consider your claim under section 552.111 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation

with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). An agency’s policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no writ); Open Records Decision No. 615 at 4-5. We note that while section 552.111 can apply to communications involving third parties, section 552.111 is not applicable to communications with a party with which the governmental body has no privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990); *see also* Open Records Decision No. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body’s request and performing task that is within governmental body’s authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant).

You state that the information you seek to withhold under section 552.111 consists of “advice, opinions, and recommendations used in the decisional process within [SAWS] or between it and other agencies to include frank discussions in the deliberative process.” Upon review, however, we note that the majority of the information you seek to withhold under section 552.111 is purely factual information, or relates solely to internal administrative matters and does not relate to the policymaking processes of SAWS. We have marked a small amount of information consisting of advice, recommendations, or opinions reflecting the policymaking processes of SAWS that may be withheld under section 552.111. The remainder of the submitted information may not be withheld under section 552.111.

We next address your claim under section 552.136 with respect to a portion of the submitted information. Section 552.136 of the Government Code provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

- (2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

You indicate that a portion of the submitted information, which you have marked, relates to computer network security or to an assessment of the extent to which a computer network system is vulnerable to unauthorized access or harm. Based on your representations and our review of the information at issue, we determine that SAWS must withhold the marked portion of the information pursuant to section 552.136 of the Government Code.

We also note that the submitted information contains e-mail addresses that may be excepted under section 552.137 of the Government Code. Section 552.137 provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

- (c) Subsection (a) does not apply to an e-mail address:

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

- (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

- (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

- (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137).

Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address or Uniform Resource Locator, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. We have marked e-mail addresses in the submitted information that are within the scope of section 552.137(a). Unless SAWS has received affirmative consent to disclose the e-mail addresses, SAWS must withhold the marked e-mail addresses under section 552.137 of the Government Code.

Finally, we note that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code.³ Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information that other statutes make confidential. Gov't Code § 552.101. The Seventy-eighth Legislature recently added sections 418.176 through 418.183 to chapter 418 of the Government Code. These newly enacted provisions make certain information related to terrorism confidential. House Bill 9, which became effective on June 21, 2003, provides for the confidentiality of certain information collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 3, 2003 Tex. Sess. Law Serv. 4809, 4814 (to be codified at Gov't Code §§ 418.176-418.183).

The newly enacted section 418.181 of the Government Code makes confidential certain information relating to the vulnerability of critical infrastructure to an act of terrorism. We have marked portions of the submitted documents that are confidential pursuant to section 418.181 and must be withheld pursuant to section 552.101 of the Government Code.

In summary, the portion of the submitted information that SAWS seeks to withhold pursuant to the attorney-client privilege is excepted under section 552.107 of the Government Code

³The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

and may be withheld. We have marked a small portion of the submitted information that is excepted from disclosure under section 552.111 of the Government Code. We have marked information that SAWS must withhold pursuant to section 552.136 of the Government Code. Unless SAWS receives affirmative consent to disclosure of the marked e-mail addresses, the marked e-mail addresses must be withheld under section 552.137 of the Government Code. We have also marked information that SAWS must withhold pursuant to section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Saldivar", with a stylized flourish at the end.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 188333

Enc: Submitted documents

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